

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KELLOGG USA, INC., KEEBLER
COMPANY, and KELLOGG COMPANY,

Defendants.

CIVIL ACTION NO. : 1:12cv1164

HON. ROBERT J. JONKER

CONSENT DECREE

WHEREAS, Plaintiff, the United States of America (the United States) on behalf of the U.S. Environmental Protection Agency (EPA), has, simultaneously with the lodging of this Consent Decree, filed a Complaint in this action against the Kellogg USA, Inc., Keebler Company, and Kellogg Company (collectively, “Kellogg”), pursuant to Sections 113(b) and 167 of the Clean Air Act (Clean Air Act or the Act), 42 U.S.C. §§ 7413(b) and 7477, for injunctive relief and the assessment of civil penalties for violations of : (a) the Prevention of Significant Deterioration (PSD) provisions of the Act, 42 U.S.C. §§ 7470-7492, and the PSD regulations incorporated into the federally enforceable Michigan State Implementation Plan (Michigan SIP); and (b) Title V of the Act, 42 U.S.C. §§ 7661-7661f, and Title V’s implementing federal and Michigan regulations, at Kellogg’s cereal and snack food manufacturing plants located in Battle Creek, Michigan (the Battle Creek Facility) and Grand Rapids, Michigan (the Grand Rapids Facility), respectively;

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg's Battle Creek Facility was a major source because it had the potential to emit over 100 tons per year (tpy) of Volatile Organic Compounds (VOCs) from the Direct Extrusion cereal line (DX Line) at that facility, in excess of the 100 tpy VOC-threshold for determining what constitutes a major source under Michigan's Title V program.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg made physical and/or operational changes to flavor-coating equipment on the DX Line at its Battle Creek Facility by changing the operation of the coating drum to include VOC-containing flavorings in the cereal; a dryer that dried the cereal coming out of the coating drum, and a cooler that cooled the cereal coming out of the dryer, that increased that line's potential to emit by at least an additional 44 tpy of VOCs.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg modified and operated the DX Line at the Battle Creek Facility without first obtaining a Michigan Title V (Renewable Operating) Permit pursuant to MAC Rule 336.1211.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that in April 2002, Kellogg installed flavor coating equipment consisting of a coating drum, dryer and cooler on the bran line at the Battle Creek Facility which caused emissions of VOCs. Kellogg failed to obtain a permit to install prior to modifying the bran line, and operated the line without such permit until April 2008. The addition to the bran line is referred to herein as the Bran Coating Line.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg modified and operated the Bran Coating Line without obtaining a permit to install as required by MAC Rule 336.1201 of the Michigan SIP.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg's Grand Rapids Facility was a major source that had the potential to emit in excess of the 100 tpy VOC-threshold for determining what constitutes a major source under Michigan's Title V program.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg acquired the Grand Rapids Facility (including, but not limited to, lines 1, 4, 5, and 7) on or about March 26, 2001 and operated it until September 4, 2008 without first obtaining a Michigan Title V (Renewable Operating) Permit pursuant to MAC Rule 336.1211.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg made several physical and/or operational changes on Pop-Tarts®-manufacturing lines 1 and 7 at the Grand Rapids Facility that caused emissions of VOCs from those lines.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg modified and operated lines 1 and 7 without first obtaining a permit to install, as required by MAC Rule 336.1201 of the Michigan SIP.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg modified cookie, Graham cracker and cereal manufacturing lines 4 and 5 and later made improvements to line 5 at the Grand Rapids Facility that caused emissions of VOCs from those lines.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg modified and operated lines 4 and 5 without first obtaining a permit to install, as required by MAC Rule 336.1201 of the Michigan SIP.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that in April 2002, MDEQ issued Kellogg a Title V Renewable Operating Permit for two oil- and gas-fired boilers (Boiler 1 and Boiler 2) at Kellogg's Battle Creek Facility.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg's Title V Renewable Operating Permit for Boiler 1 and Boiler 2 limited nitrogen oxide (NO_x) emissions to 0.10 pounds per million British Thermal Units (lb/mmBtu) when firing natural gas.

WHEREAS, in its Complaint, the United States alleges, *inter alia*, that Kellogg violated its Title V NO_x emission limit for Boilers 1 and 2 at various times during 2005, 2006 and 2007, and thus violated Section 502(a) of the Act, 42 U.S.C. § 7661a(a).

WHEREAS, Kellogg denies the allegations in the Complaint of the United States and does not admit that it has any liability to the United States arising out of the occurrences alleged in the Complaint.

WHEREAS, the parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the parties in good faith and will avoid litigation between the parties and that this Consent Decree is fair, reasonable, and in the public interest.

NOW THEREFORE, before the taking of any testimony, without adjudication of any issue of fact or law except as provided in Section I. (Jurisdiction and Venue) below, and upon the consent and agreement of the Parties, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1311, 1345 and 1355 and Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477, and over the Parties. Venue lies in this district pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391(b) and (c) and 1395(a), because the violations alleged in the Complaint occurred in that district and Kellogg does not contest the Court's jurisdiction over this action or over Kellogg and does not contest venue in this judicial district.

2. This Complaint states claims upon which relief may be granted pursuant to Sections 165 and 172 of the Act, 42 U.S.C. §§ 7475 and 7503.
3. Notice of the commencement of this action has been given to the state of Michigan, as required by Section 113(b) of the Act, 42 U.S.C. § 7413(b).

II. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the United States and upon Kellogg and any successors, assigns, or other entities of person otherwise bound by law.
5. No transfer of ownership or operation of Kellogg's Battle Creek Facility and/or its Grand Rapids Facility, whether in compliance with the procedures of this paragraph or otherwise, shall relieve Kellogg of its obligation to ensure that the terms of this Consent Decree are implemented unless the transferee agrees to undertake the obligations required by this Decree. At least thirty (30) days prior to any transfer of ownership or operation of the Battle Creek Facility and/or the Grand Rapids Facility, Kellogg shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to the United States and to the State, in accordance with Section XIV (Notices) of this Consent Decree. Any attempt to transfer such ownership or operational control of the Battle Creek Facility and/or the Grand Rapids Facility, or any portion thereof, without complying with this paragraph constitutes a violation of this Consent Decree.
6. Kellogg shall provide a copy of this Consent Decree to all officers, employees and agents whose duties might reasonably include compliance with any provision of this Consent Decree, as well as to any Contractor retained to perform work required under this

Consent Decree, except for Contractors whose work is limited to the mitigation project only.

7. In any action to enforce this Consent Decree, Kellogg shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree, subject to Section VIII (Force Majeure).

III. DEFINITIONS

8. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:
 - a. "Act" shall mean the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*;
 - b. "Complaint" shall mean the Complaint filed by the United States in this action;
 - c. "Consent Decree" shall mean this Consent Decree and all amendments and modifications thereto;
 - d. "Day" shall mean a calendar day unless expressly stated to be a "Business Day."
"Business Day" shall mean a day other than a Saturday, Sunday or federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;
 - e. "Effective Date" shall mean the date of entry of this Consent Decree by the Court after satisfaction of the public notice and comment procedures of 28 C.F.R. § 50.7 and Section 113(g) of the Act, 42 U.S.C. § 7413(g), pursuant to Para. 54 of this Consent Decree;

- f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;
- g. "MDEQ" shall mean the Michigan Department of Environmental Quality and any successor entities and/or organizations;
- h. "Michigan SIP" shall mean the federally approved and enforceable state implementation plan adopted by Michigan pursuant to Section 110 of the CAA, 42 U.S.C. § 7410;
- i. "NSR" shall mean the nonattainment New Source Review program of Part D of Subchapter I of the Act, 42 U.S.C. §§ 7501-7515, and 40 C.F.R. Part 51;
- j. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral;
- k. "Parties" shall mean the United States and Kellogg;
- l. "PSD" shall mean the Prevention of Significant Deterioration program within the meaning of Part C of Subchapter I of the Act, 42 U.S.C. §§ 7470-7492, and 40 C.F.R. Part 52;
- m. "Section" shall mean a portion of this Consent Decree identified by a roman numeral;
- n. "Kellogg" shall mean the Kellogg Company and Kellogg USA;
- o. "State" shall mean the state of Michigan; and
- p. "United States" shall mean the United States of America, acting on behalf of EPA.

IV. CIVIL PENALTY

- 9. No later than thirty (30) days after the Effective Date of this Consent Decree, Kellogg shall pay a civil penalty in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00) to the United States of America plus interest, at the rate established by the Secretary of the Treasury pursuant to 28 U.S.C. § 1961 as of the date of lodging of this

Consent Decree, from the date the civil penalty is due, to the date of payment of the penalty.

10. Kellogg shall pay the civil penalty due by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice in accordance with instructions to be provided to Kellogg upon entry of the Consent Decree by the Financial Litigation Unit (“FLU”) of the U.S. Attorney’s Office for the Western District of Michigan, 330 Ionia Ave. NW, Grand Rapids, Michigan 49503, telephone number: (616) 456-2404. Any EFTs received at the DOJ lockbox bank after 11:00 a.m. Eastern Time will be credited on the next business day. At the time of payment, Kellogg shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States v. Kellogg USA, Inc. et al.*, shall reference the civil action number, United States Attorney’s Office (“USAO”) file number 2009V00031, and DOJ case number 0-5-2-1-09637, to the United States in accordance with Section XIV (Notices) of this Consent Decree; by email to acctsreceivable.CINWD@epa.gov; and by mail to:

U.S. EPA
Fines & Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

11. A transmittal letter stating Respondent’s name, the case title, Respondent’s complete address, the case docket number and the billing document number must accompany the payment. Respondent must also send a copy of the check and transmittal letter to:

Bonnie Bush (AE-17J)
Air Enforcement and Compliance Assurance Section (MI/WI)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Cynthia N. Kawakami (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

12. Kellogg shall not deduct any penalties paid under this Consent Decree pursuant to this Section or Section VII (Stipulated Penalties) in calculating its federal, state or local income tax.

V. COMPLIANCE REQUIREMENTS

13. By no later than 30 days after the Effective Date of this Consent Decree, Kellogg shall submit appropriate federally enforceable permit applications to the MDEQ for the DX and Bran Coating Lines at the Battle Creek Facility and Lines 1, 2, 4, 5, 6, and 7 at the Grand Rapids Facility to include the new VOC emission limitations as follows:

Battle Creek Facility New VOC Limits

Bran Coating Line: 12 tpy

DX Line: 24 tpy

Grand Rapids Facility New VOC Limits

Line 1: 25 tpy (no change)

Line 2: 25 tpy (no change)

Line 4: 5 tpy

Line 5: 20 tpy (no change)

Line 6: 5 tpy

Line 7: 25 tpy

14. Kellogg shall cooperate fully with MDEQ with respect to the State's processing of Kellogg's applications to include the new VOC emission limitations (as set forth in this Consent Decree) in its federally enforceable permits for the Battle Creek and Grand Rapids Facilities. Kellogg shall promptly comply with all reasonable requests for

required information, monitoring, testing and reporting made by MDEQ with respect to Kellogg's applications.

15. Upon lodging of this Consent Decree, Kellogg shall comply with the new VOC emission limits set by Paragraph 13 of this Consent Decree.

16. Battle Creek Facility Chilled Water Tank Farm and Sugar Silo Project/Mitigation Project. Kellogg will implement the Chilled Water Tank Farm and Sugar Silo Project, a Mitigation Project at the Battle Creek Facility in accordance with this paragraph. This Mitigation Project shall be completed by no later than 18 months from the Effective Date of this Consent Decree.

a. This Mitigation Project shall consist of installing a closed loop cooling system on a raw materials storage silos air supply to eliminate the use of "once-through" cooling water. This cooling system will eliminate the use of the refrigerant R-22 in three air handling units to produce cool air needed for moisture/humidity removal. This new closed loop will tie-in to the existing central chilled water system.

b. Kellogg shall not use or rely on the emission reductions generated as a result of its performance of the Chilled Water Tank Farm and Sugar Silo Project in any federal or state emission averaging, banking, trading, netting or similar emission compliance program.

c. Kellogg is responsible for the satisfactory completion of the Mitigation Project required under this Consent Decree in accordance with this Section. Upon completion of the Mitigation Project set forth herein, Kellogg will submit to EPA and the MDEQ a certificate of completion.

d. By signing this Consent Decree, Kellogg certifies that it is not required, and has no liability under any federal, state, regional or local law or regulation or pursuant to any agreements or orders of any court, to perform or develop the Mitigation Project identified in this paragraph.

e. Kellogg further certifies that it has not applied for or received, and will not in the future apply for or receive: (1) credit as a Mitigation Project or other penalty offset in any other enforcement action for the project set forth in this paragraph; (2) credit for any emissions reductions resulting from the project set forth in this paragraph in any federal, state, regional or local emissions trading or early reduction program; or (3) a deduction from any federal, state, regional, or local tax based on its participation in, performance of, or incurrence of costs related to the project set forth in this paragraph.

VI. REPORTING REQUIREMENTS

17. Kellogg shall submit the following reports:

a. Within sixty (60) days after January 1 of each calendar year beginning after the lodging of this Consent Decree, until termination of this Decree pursuant to Section XVIII (Termination), Kellogg shall submit in writing a progress report for the preceding twelve (12)-month time period that shall include the status of implementation of the Compliance Requirements of Section V (Compliance Requirements), above, including information that identifies when Kellogg submitted the permit applications described in Paragraph 13, calculations that demonstrate Kellogg's compliance with paragraph 13 of this Consent Decree, and a statement of the total VOC emissions in tons or pounds per month from the DX Line and from the Bran Coating Line at the Battle Creek Facility for the applicable

year. The progress reports shall include for each month in the reporting period, for each of the two lines: 1) the dates of startup and shutdown of operations, and operating uptime (the total number of operating hours during the reporting period); 2) the amount of each flavoring used on each line in pounds, and 3) the percent VOC content of each flavoring identified in 2).

b. If Kellogg fails to comply, or has reason to believe it may not be in compliance, with any requirement of this Consent Decree, Kellogg shall notify the United States and MDEQ of such non-compliance or possible non-compliance and its likely duration in writing within ten (10) business days of the day Kellogg first becomes aware of the non-compliance or possible non-compliance, with an explanation of the likely cause of the non-compliance or possible non-compliance and of the remedial steps taken, and/or to be taken, to prevent or minimize such noncompliance. If the cause of the noncompliance or possible non-compliance cannot be fully explained at the time the report is due, Kellogg shall include a statement to that effect in the report. Kellogg shall immediately investigate to determine the cause of the non-compliance or possible non-compliance and then shall submit an amendment to the report, including a full explanation of the cause of the noncompliance or possible non-compliance within thirty (30) days of the day Kellogg becomes aware of the cause. Nothing in this paragraph relieves Kellogg of its obligation to provide the notice required by Section VIII (Force Majeure) of this Consent Decree.

18. All reports shall be submitted to the persons designated in Section XIV (Notices) of this Consent Decree.

19. Each report submitted by Kellogg under this Section shall be signed by an official of Kellogg and include the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate and complete. I am aware that there are significant penalties for submitting materially false information, including the possibility of fines and imprisonment.

20. Kellogg shall retain all underlying documents from which it has compiled any report or other submission required by this Consent Decree until five years after termination of the Decree.
21. The reporting requirements of this Consent Decree do not relieve Kellogg of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, or requirement.
22. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law; provided, however, any information claimed to be confidential business information or trade secrets shall be provided under the terms of 40 C.F.R. Part 2, Subpart B.

VII. STIPULATED PENALTIES

23. Kellogg shall be liable for stipulated penalties in the amounts set forth in this Section to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section VIII (Force Majeure). "Compliance" shall include completion of the activities under this Consent Decree in accordance with all applicable requirements of this Decree, and within the specified time schedules established by and approved under this Decree. "Compliance" shall also include payment

of the civil penalty, meeting the reporting requirements of this Decree, and meeting the applicable Compliance Requirements set forth in Section V (Compliance Requirements).

24. Compliance Milestones

- a. The following stipulated penalties shall accrue per violation per day for any noncompliance with the requirements identified in Subparagraphs b and c of this paragraph:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$2,000	1st through 14th day
\$3,000	15th through 30th day
\$10,000	31st day and beyond

- b. Payment of the civil penalty under this Consent Decree; and
- c. Compliance Requirements of Section V (Compliance Requirements) of this Consent Decree, including, but not limited to, meeting the new VOC emission limitations (as set forth in Para. 13) upon the date of the lodging of this Consent Decree until the date when such emission limitations are incorporated by MDEQ into final Title V and/or other federally enforceable permit amendments for Kellogg.

25. Reporting Requirements. The following stipulated penalties shall accrue per violation per day for any noncompliance with the reporting requirements of Section VI (Reporting Requirements) of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th day
\$1,500	15th through 30th day

\$5,000

31st day and beyond

26. Kellogg shall pay any stipulated penalty within thirty (30) days of receiving the United States' written demand. Stipulated penalties shall be paid by certified or cashier's check in the amount due, payable to the "Treasurer, United States of America," referencing DOJ No. 90-5-2-1-09637, and USAO file number 2009V00031, and shall be transmitted to the office of the United States Attorney, Western District of Michigan, Financial Litigation Unit, 330 Ionia Ave. NW, Grand Rapids, Michigan 49503.
27. All stipulated penalties shall begin to accrue on the day after the report is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until the report is satisfactorily completed and submitted or until the violation ceases. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree, except that when two or more violations are based upon the same noncompliance, the higher stipulated penalty shall apply.
28. Penalties shall continue to accrue as provided in accordance with Para. 27 during any dispute resolution, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:
- a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, accrued penalties determined to be owing, together with accrued interest, shall be paid to the United States within thirty (30) days of the effective date of the agreement or the receipt of EPA's decision or order;
 - b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Kellogg shall, within sixty (60) days of receipt of the Court's decision or order,

- pay all accrued penalties determined by the Court to be owing, together with accrued interest, except as provided in Subparagraph c, below; and
- c. If the District Court's decision is appealed by any Party, Kellogg shall, within thirty (30) days of receipt of the final appellate court decision, pay all accrued penalties determined to be owing to the United States, together with accrued interest.
29. Should Kellogg fail to pay stipulated penalties and accrued interest in accordance with the terms of this Consent Decree, the United States shall be entitled to collect interest and late payment costs and fees, as set forth in any applicable laws or regulations, together with the costs (including attorneys' fees) incurred in any action necessary to collect any such stipulated penalties, interest, or any applicable late payment costs or fees.
30. Kellogg's payment of stipulated penalties under this Section shall be in addition to any other rights or remedies available to the United States by reason of Kellogg's failure to comply with any requirement of this Consent Decree or applicable law.

VIII. FORCE MAJEURE

31. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Kellogg, its contractors, or any entity controlled by Kellogg that delays or prevents the performance of any obligation under this Consent Decree despite Kellogg's best efforts to fulfill the obligation. "Best Efforts" include using best efforts to anticipate any potential Force Majeure event and to address the effects of any such event (a) as it is occurring, and (b) after it has occurred, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include Kellogg's financial inability to perform any obligation under this Consent Decree.
32. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, as to which Kellogg intends to assert a claim of Force

Majeure, Kellogg shall provide notice in writing, as provided in Section XIV (Notices) of this Decree, within ten (10) business days of the time Kellogg first knew of, or by the exercise of due diligence should have known of, the event. Such notification shall include an explanation and description of the reasons for the delay; the anticipated duration of the delay; a description of all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; and Kellogg's rationale for attributing such delay to a Force Majeure event. Failure to comply with the above requirements shall preclude Kellogg from asserting any claim of Force Majeure. Kellogg shall be deemed to know of any circumstance of which Kellogg or its contractors knew or should have known.

33. Kellogg shall have the burden of proving, by a preponderance of the evidence, that each event described in the preceding paragraph was a Force Majeure event; that Kellogg gave the notice required by the preceding paragraph; that Kellogg took all reasonable steps to prevent or minimize any delay caused by the event; and that any period of delay it claims was attributable to the Force Majeure event was caused by that event.

34. If the Parties agree that Kellogg's delay in compliance was attributable to a Force Majeure event, the Parties shall stipulate to an extension of time for Kellogg's performance of the affected compliance requirement by a period not exceeding the delay actually caused by such event. In such circumstances, the appropriate modification shall be made pursuant to Section XVII (Modification) of this Consent Decree, where the modification is to a term of this Decree. In the event the Parties cannot agree, the matter shall be resolved in accordance with Section IX (Dispute Resolution) of this Decree. An extension of time for performance of the obligations affected by a Force Majeure event shall not, of itself, extend the time for performance of any other obligation.

IX. DISPUTE RESOLUTION

35. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Decree. However, such procedures shall not apply to actions by the United States to enforce obligations of Kellogg that have not been disputed in accordance with this Section.

36. The invocation of dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Kellogg under this Consent Decree, not directly in dispute, unless the United States agrees or the Court orders otherwise. Stipulated penalties with respect to the disputed matter, if applicable, shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in this Section. In the event that Kellogg does not prevail on the disputed issue, applicable stipulated penalties shall be assessed and paid as provided in Section VII (Stipulated Penalties).

37. Informal Dispute Resolution.

Any dispute which arises under or with respect to this Consent Decree shall first be the subject of informal negotiations. The period of informal negotiations shall not exceed twenty (20) days from the time Kellogg sends the United States a written Notice of Dispute in accordance with Section XIV (Notices) of this Decree, unless that period is modified by written agreement. Such Notice of Dispute shall state clearly the matter in dispute. The failure to submit a Notice of Dispute within ten (10) days from the date upon which the issue in dispute first arises waives Kellogg's right to invoke dispute resolution under this Section.

38. Formal Dispute Resolution.

- a. Kellogg shall invoke formal dispute resolution procedures within the time period provided in the preceding Para. 37 by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not necessarily be limited to, any factual data, analysis, or opinion supporting Kellogg's position and any supporting documentation relied upon by Kellogg.
- b. The United States shall serve its Statement of Position within forty-five (45) days of receipt of Kellogg's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Kellogg, unless Kellogg files a motion for judicial review of the dispute in accordance with the following paragraph.
- c. Kellogg may seek judicial review of the dispute by filing with the Court and serving on the United States a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) days of receipt of the United States' Statement of Position pursuant to the preceding paragraph. The motion shall contain a written statement of Kellogg's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.
- d. The United States shall respond to Kellogg's motion within the time period allowed by the Local Rules of the Court. Kellogg may file a reply memorandum, to the extent permitted by the Local Rules.

39. Standard of Review

a. Disputes Concerning Matters Accorded Record Review.

Except as otherwise provided in this Consent Decree, in any dispute brought under this paragraph pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Kellogg shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes.

Except as otherwise provided in this Consent Decree, in any other dispute brought under Para. 39a, Kellogg shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of the Consent Decree.

X. INFORMATION COLLECTION/RIGHT OF ENTRY

40. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry to the Battle Creek and Grand Rapids Facilities that are covered by this Consent Decree, at all reasonable times, upon presentation of credentials to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;

- c. obtain documentary evidence, including photographs and similar data; and
- d. assess Kellogg's compliance with this Consent Decree.

41. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Kellogg to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XI. FAILURE OF COMPLIANCE

42. Notwithstanding the United States' review and approval of any documents submitted to it by Kellogg pursuant to this Consent Decree, Kellogg shall remain solely responsible for compliance with the terms of the Act, its regulations, and this Decree.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

43. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint that was filed in this action through the date of lodging of this Consent Decree.

44. This Consent Decree shall not be construed to prevent or limit the rights of the United States to obtain penalties or injunctive relief under the Act, or under other federal or state laws, regulations, or permit conditions, except as expressly specified herein.

45. Kellogg is responsible for achieving and maintaining complete compliance with all applicable federal, State and local laws, regulations, and permits; and Kellogg's compliance with this Consent Decree shall be no defense to any action commenced pursuant to said laws, regulations, or permits, except with respect to claims that have been specifically resolved pursuant to Paragraph 43 above

46. This Consent Decree does not apply to any claims of alleged criminal liability.

47. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief or civil penalties relating to the facilities covered by the Complaint in this action, Kellogg shall not assert any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, or claim splitting, or any defense based upon the contention that claims raised by Plaintiff in the subsequent proceeding were brought, or should have been brought in the instant case; provided, however, that nothing in this paragraph is intended to, or shall, affect the validity of Para. 43 of this Consent Decree.
48. This Consent Decree does not limit or affect the rights of Kellogg or of the United States against any third parties not party to this Consent Decree, nor does it limit the rights of third parties not party to this Consent Decree, against Kellogg, except as otherwise provided by law.
49. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.
50. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated herein.

XIII. COSTS

51. The Parties shall each bear their own costs of litigation of this action, including attorneys' fees, except that the United States shall be entitled to collect any costs, including, but not limited to, attorneys' fees incurred in any action necessary to collect any portion of the Civil Penalty or any Stipulated Penalties not paid by Kellogg.

XIV. NOTICES

52. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, DC 20044-7611
Re: DOJ No. 90-5-2-1-09637

and

Ryan Cobb
Assistant United States Attorney
Office of the United States Attorney
Western District of Michigan
330 Ionia Ave. NW, Grand Rapids, MI 49503

To the U.S. Environmental Protection Agency:

U.S. Environmental Protection Agency-Region 5
Attn: Compliance Tracker (AE-17 J)
77 West Jackson Boulevard Chicago, IL 60604

To Kellogg:

Mr. Thomas Monroe
Kellogg Company
Legal Department
1 Kellogg Square
Battle Creek, MI 49017-3534

and

Mr. John Byl
Warner Norcross & Judd, LLP
111 Lyon St. NW
Grand Rapids, MI 49503

53. Notices submitted pursuant to this Section shall be deemed effective upon receipt, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XV. EFFECTIVE DATE

54. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Decree is granted by Court Order, whichever occurs first as recorded on the Court's docket.

XVI. RETENTION OF JURISDICTION

55. Continuing Jurisdiction.

The Court retains jurisdiction of this case after entry of this Consent Decree until termination of the Consent Decree to enforce compliance with the terms and conditions of this Consent Decree and to take any action necessary or appropriate for its interpretation, construction, execution, or modification, and/or to resolve disputes between the parties as provided in Section VIII (Force Majeure) and Section IX (Dispute Resolution) provisions of this Consent Decree. During the term of this Consent Decree, any Party may apply to the Court for any relief necessary to construe or effectuate this Consent Decree.

XVII. MODIFICATION

56. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties or by Order of the Court. Where the modification constitutes a material change to this Consent Decree, it shall be effective only upon approval by the Court.

57. Any disputes concerning modification of this Consent Decree shall be resolved pursuant to Section IX (Dispute Resolution) of this Decree, provided, however, that, instead of the burden of proof provided by Para. 39, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XVIII. TERMINATION

58. Request for Termination of Consent Decree. After Kellogg has completed all the requirements of Section V (Compliance Requirements) and VI (Reporting Requirements) of this Consent Decree, and has been in compliance with the VOC emission limits set forth in Para. 13 of this Consent Decree for at least one year from the date that MDEQ issues final enforceable permits that incorporate the emission limits set forth in Para. 13, and has paid the Civil Penalty and any accrued Stipulated Penalties and any applicable interest, penalties and fees as required by this Consent Decree, Kellogg may serve upon the United States a Request for Termination of the Consent Decree. This Request for Termination shall incorporate all necessary supporting documentation, including, but not limited to, a notice of certification from an authorized representative of Kellogg that states that Kellogg has satisfied those requirements.
59. Following receipt by the United States of Kellogg's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Kellogg has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.
60. If the United States does not agree that the Decree may be terminated, Kellogg may invoke Dispute Resolution under Section IX (Dispute Resolution) of this Decree. However, Kellogg shall not seek Dispute Resolution of any dispute regarding termination under Section XVIII (Termination) of this Consent Decree until thirty (30) days after service of its Request for Termination.

XIX. PUBLIC PARTICIPATION

61. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R. § 50.7 and Section 113(g) of the Act, 42 U.S.C. § 7413(g). The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate, in which case the Consent Decree shall be null and void. Kellogg consents to entry of this Consent Decree without further notice.

XX. SIGNATORIES/SERVICE

62. Each undersigned representative of Kellogg and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.
63. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.
64. Kellogg hereby agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Kellogg in writing that it no longer supports entry of the Decree.
65. Kellogg hereby agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXI. INTEGRATION

66. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree

and supersedes all prior agreements and understandings, whether oral or written. No other document, nor any representation, inducement, agreement, understanding, or promise, not contained herein, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XXII. FINAL JUDGMENT

67. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and Kellogg.

Dated and entered this 13th day of December, 2012.

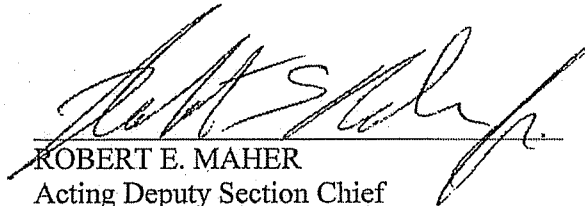
/s/Robert J. Jonker

UNITED STATES DISTRICT JUDGE
Western District of Michigan

United States v. Kellogg Company

FOR THE UNITED STATES OF AMERICA:


Date: 9/26/12



ROBERT E. MAHER
Acting Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: 10/5/2012

PATRICK A. MILES, JR.
United States Attorney
Western District of Michigan



RYAN COBB
Assistant United States Attorney
330 Ionia Ave. NW
Grand Rapids, MI 49503
(616) 456-2404

United States v. Kellogg Company

FOR THE U.S. ENVIRONMENTAL
PROTECTION AGENCY:

Date: October 19, 2012



SUSAN HEDMAN
Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

Date: October 16, 2012



ROBERT A. KAPLAN
Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

Date: October 10, 2012



CYNTHIA N. KAWAKAMI
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

United States v. Kellogg Company

FOR THE KELLOGG COMPANY

Date:

10/9/12

Signature:

Typed/Printed Name: Gary H. Pilnick

Title: Senior Vice President, General Counsel, Corporate
Development, Secretary

Address: One Kellogg Square, P. O. Box 3599
Battle Creek, MI 49016-3599

Agent Authorized to Accept Service on Behalf of Above-Signed Party:
Warner Norcross & Judd, LLP

Typed/Printed Name: John V. Byl

Title: Attorney

Address: 111 Lyon NW, 900 Fifth Third Center, Grand Rapids, MI 49503